TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 160

MILLER BROTHERS COMPANY, APPELLANT,

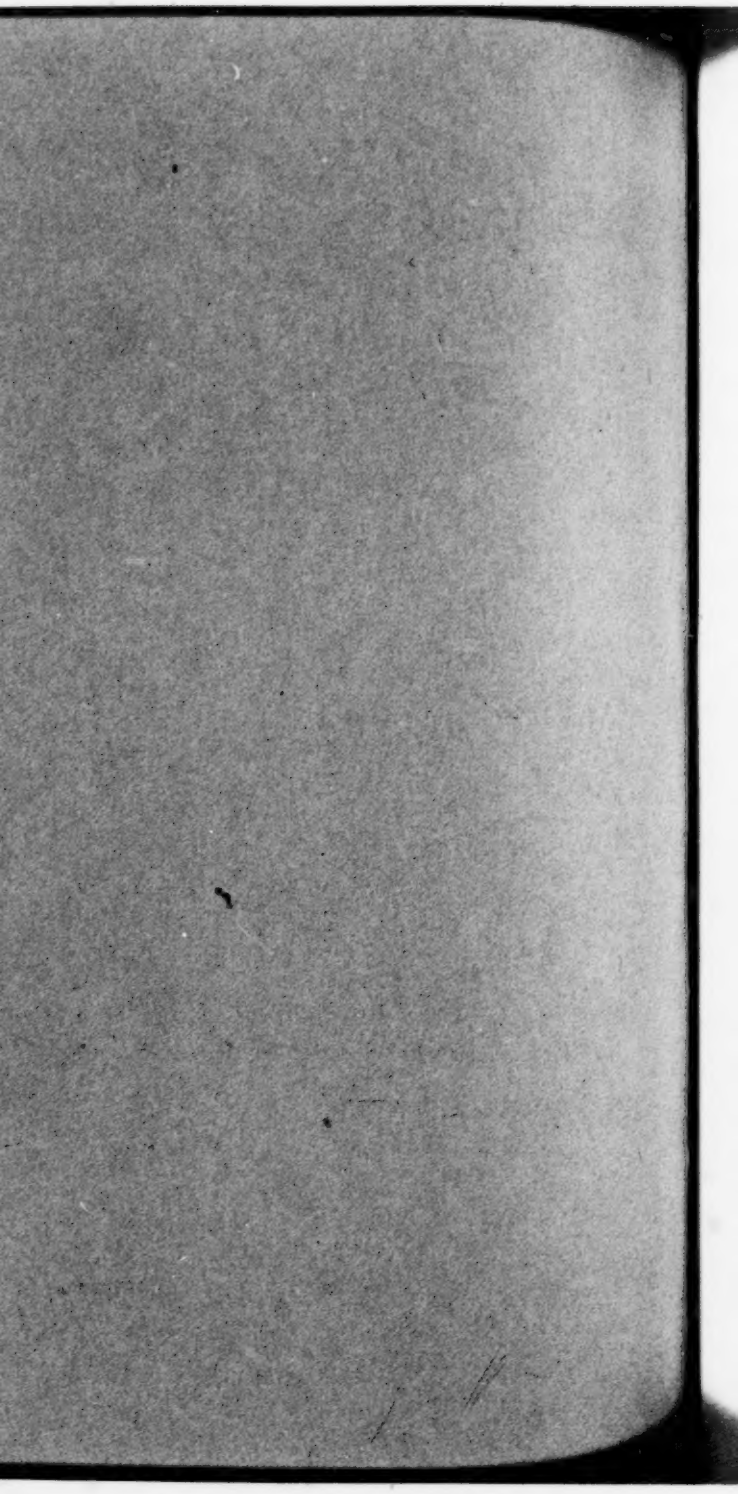
vs.

STATE OF MARYLAND

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

FILED JUNE 30, 1953

Probable jurisdiction noted October 12, 1953



BLEED THROUGH

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INDEX

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[fols. 1-9]

IN THE SUPREME COURT OF BALTIMORE CITY

R. D.

File 24,968-24,969

Docket 1952

Folio 352

STATE OF MARYLAND, 34 Hopkins Place, Baltimore 1, Maryland,

v.

MILLER BROTHERS COMPANY, Wilmington, Delaware

AFFIDAVIT FOR ATTACHMENT AGAINST NON-RESIDENT OR ABSCONDING DEBTOR—Filed 19 March 1952

Be it Remembered, and it is hereby certified, that on this 19th day of March, in the year nineteen hundred and fifty-two, personally appeared before the subscriber, a Notary Public of the State of Maryland,

Edward F. Engelbert, Assistant Director, Retail Sales Tax Division, Office of the Comptroller, and made oath in due form of law that

Miller Brothers Company, Wilmington, Delaware, is justly and bona fide indebted unto the said State of Maryland, by reason of their failure and refusal to pay legally assessed deficiencies to the said State of Maryland, in Use Taxes justly due and owing, in the full and just sum of Three Hundred Fifty-six Dollars and Forty cents ($356.40), over and above all discounts. And at the same time the said Edward F. Engelbert produced to me a Statement of Account on and by which the said Miller Brothers Company is so indebted, which is hereunto annexed.

In testimony whereof, I hereunto set my hand and affix my Seal Notarial, the day and year aforesaid.

Jeanette M. Finnegan, Notary Public. (Notarial Seal.)

[fol. 10] IN THE SUPERIOR COURT OF BALTIMORE CITY

STATE OF MARYLAND, 34 Hopkins Place, Baltimore 1, Maryland,

against

MILLER BROTHERS COMPANY, Wilmington, Delaware

ACTION IN ATTACHMENT NAR (SHORT NOTE) AND STATEMENT OF ACCOUNT—Filed March 19, 1952

This suit is instituted to recover the sum of Three Hundred Fifty-six Dollars and Forty cents ($356.40) due and owing from the Defendant to the Plaintiff, for that under and by virtue of the Maryland Retail Sales and Use Tax Act, Sections 259 to 336, inclusive, of Article 81 of the Annotated Code of Maryland (1947 Supp.), the Comptroller has assessed a deficiency in Use Tax against the Defendant herein in the amount of $356.40 which said deficiency has become final; that there is due and owing to the Plaintiff the aforesaid sum of $356.40 as shown on the attached Statement of Account; that demand was made on the Defendant for payment of the said moneys but that the Defendant has refused and still refuses to pay the same.

Hall Hammond, Attorney General, Edward F. Engelbert, Asst. Dir. Retail Sales Tax Division, Office of the Comptroller, 34 Hopkins Place, Baltimore 1, Maryland.

[fol. 11] STATEMENT OF ACCOUNT

The following constitutes a true and perfect computation of Use Tax, interest and penalty due and owing by Miller Brothers Company, Wilmington, Delaware to the State of Maryland:

Computation of Use Tax:
Period Covered: July 1, 1947 thru

	December 31, 1951	$356.40
Tax due	$240.00	
Interest	32.40	
Penalty	84.00	$356.40

Edward F. Engelbert, Asst. Dir. Retail Sales Tax Division, Office of the Comptroller, 34 Hopkins Place, Baltimore 1, Maryland.

[fol. 12] IN THE SUPERIOR COURT OF BALTIMORE CITY

[Title omitted]

INSTRUCTIONS TO SHERIFF—filed March 19, 1952

Mr. Sheriff:

Please attach all motor vehicles belonging to the Defendant.

Hall Hammond, Attorney General, Edward F. Engelbert, Asst. Dir. Retail Sales Tax Division, Office of the Comptroller, 34 Hopkins Place, Baltimore 1, Maryland.

[fol. 13] IN THE SUPERIOR COURT OF BALTIMORE CITY

April R. D. 341

Docket 1952

File 24968

Folio 352

WRIT OF SUMMONS AND SHERIFF'S RETURN—March 19, 1952

Baltimore City, to wit: State of Maryland

To the Sheriff of Baltimore City, Greeting:

You are hereby commanded to summon Miller Brothers Company, Wilmington, Delaware to appear before the Superior Court of Baltimore City, to be held at the Court

House in the same city, on the First Monday of April next, to answer an action at the suit of State of Maryland, 34 Hopkins Place and have you then and there this writ.

Witness, the Honorable W. Conwell Smith, Chief Judge of the Supreme Bench of Baltimore City, the 14th day of January 1952.

Issued 19th day of March 1952.

(S.) M. Luther Pittman, Clerk.

Mr. Sheriff:

Copy of Short Note within to be set up at the Court House door.

Hall Hammond, Edward F. Engelbert, Attorneys for Plaintiff, 34 Hopkins Place, Address.

Sheriff's return:

Non Est. as to the defendant. Copy of the Short Note set up at the Court House door.

Joseph C. Deegan, Sheriff.

Fee: $.35.

[fol. 14] IN THE SUPERIOR COURT OF BALTIMORE CITY

WRIT OF ATTACHMENT AND SHERIFF'S RETURN

Attachment under Article 81, Section 259-336, Maryland 1947

April R.D. 342 Docket 1952

File 24969 Folio 352

State of Maryland,

To the Sheriff of Baltimore City, Greeting:

Whereas, State of Maryland, by its attorneys Hall Hammond and Edward F. Engelbert have appeared before the Clerk of the Superior Court of Baltimore City, and produced and filed in Court an affidavit of Edward F. Engelbert, Asst. Director, Retail Sales Tax Div. taken before Jeanette M. Finnegan, Notary Public in accordance with the Statute in such case made and provided, that a certain Miller Brothers Company bona fide indebted to him the said State of Maryland in the full and just sum of Three

Hundred Fifty-Six dollars and Forty cents, over and above all discounts, and that the said State of Maryland is credibly informed, and verily believes that the said Miller Brothers Company—not a citizen of the State of Maryland and do not reside therein. And at the same time the said Edward F. Engelbert produced and filed the account on and by which the said Miller Brothers Company is so indebted.

We Therefore Command You, *That you Attach the lands, tenements, goods, chattels and credits* on the said Miller Brothers Company to the value of Three Hundred Fifty-Six Dollars and Forty cents, current money and costs of this attachment, according to the form of the Code of Public General Laws in such cases made and provided. And we further command you, that you make known unto the person or persons in whose hands you shall lay this attachment, that he, she or they be and appear before the Judge of the Superior Court of Baltimore City, at the Court House in the same City, on the First Monday of April next, to show cause (if any he, she or they have) why the lands, tenements, goods, chattels and credits by you attached, by virtue of this writ, in his, her or their hands, shall not be condemned, and execution thereof had and made to and for the use of the said State of Maryland as of the lands, tenements, goods, chattels and credits of the aforesaid Miller Brothers Company according to the Code of Public General Laws in such cases made and provided, if to him, her or them it shall seem meet; and how you shall execute this writ, make known to the Judge of the Superior Court of Baltimore City, at the day and place aforesaid, and have you then and there this writ.

Witness, *the Honorable* W. Conwell Smith, *Chief Judge of the Supreme Bench of Baltimore City, the 14th day of January 1952.*

Issued *19th day of March, 1952.*

(S.) M. Luther Pittman, Clerk of the Superior Court of Baltimore City.

[fol. 15] Sheriff's return:

"Attached and levied as per Schedule herewith returned and the property attached Left in the Hands of Eglin's

Parking Lot, Liberty and Clay Streets, Baltimore, Maryland, on the 4th day of April, 1952."

Joseph C. Deegan, Sheriff.

Fee: $15.21.

Pursuant to an Order of Court dated April 4, 1952 and signed by Judge S. Ralph Warnken, the automobile (station wagon) taken into custody by the Sheriff was delivered into the custody of Piper and Marbury, Counsel for the defendant.

Joseph C. Deegan, Sheriff.

SUPERIOR COURT OF BALTIMORE CITY

You have been summoned to appear in Court on the First Monday of April, 1952. Personal attendance in Court on the day named is not required; but, unless within such number of days thereafter as the law limits, legal defense is made to the above mentioned suit, a judgment by default may be entered against you.

Apr. R.D. 342 Docket 1952

File 24969 Folio 352

STATE OF MARYLAND, 34 Hopkins Place,

vs.

MILLER BROTHERS COMPANY, WILMINGTON, DELAWARE

Attachment Under Act 1888

Costs $18.85 Pd.

Hall Hammond, Edward F. Engelbert, Att'y for Plaintiff, 34 Hopkins Place, Address.

debt	$356.40
ct. costs	18.85
	$375.25
Sher. fee	15.21
	$390.46

[fol. 16] A SCHEDULE

Of the Goods, Chattels, Lands, Tenements, and Credits of Miller Bros. Company, Wilmington, Delaware, seized and taken by virtue of a writ of Attachment under Act of 1888 issued out of the Superior Court of Baltimore City and to the Sheriff thereof, directed at the suit of the State of Maryland and appraised by said Sheriff and by us, the subscribers, who being first duly summoned and sworn for that purpose.

Given under our hands and seal, this 4th day of April, 1952.

1 Auto. 1951 Willys 800.00

Station Wagon
License # Del. C 4749

Joseph C. Deegan, Sheriff. (Seal.)

[fol. 17] IN THE SUPERIOR COURT OF BALTIMORE CITY

[Title omitted]

PETITION—Filed April 4, 1952

To the Honorable, the Judges of Said Court:

The Defendant in the above entitled attachment case, appearing specially for the purpose of praying that the writ of attachment be quashed and set aside, files this Petition and respectfully shows:

1. That the Defendant is a corporation duly organized and existing under the laws of the State of Delaware, and is an "absent defendant" within the meaning of Section 20 of Article 9 of the Annotated Code of Maryland, Edition of 1939.

2. That an attachment has issued from the Superior Court of Baltimore City commanding the Sheriff of Baltimore City to attach the lands, tenements, goods, chattels and credits of the Defendant; and that the return day of such attachment will be the seventh day of April, 1952.

Wherefore, the Defendant prays that the said writ of attachment be quashed and set aside for the following reasons:

(a) The use tax which the Plaintiff claims is due and owing by the Defendant to the Plaintiff consists of use taxes which Plaintiff claims the Defendant [fol. 18] was required, by the Maryland Use Tax Law (Sections 308 to 337, inclusive of Article 81 of the Annotated Code of Maryland, 1947 Cumulative Supplement (as amended)), to collect and pay to the Plaintiff on sales of certain tangible personal property made by the Defendant in the State of Delaware to Maryland purchasers. The Defendant has not engaged nor does it engage in any local activities in the State of Maryland which could be the basis for such a requirement. If the Maryland Use Tax Law be construed to require the Defendant to make said collections and payments, said Law is void because it violates (i) the due process clause of the Fourteenth Amendment to the Constitution of the United States of America, (ii) Article 23 of the Declaration of Rights of the Constitution of Maryland, and (iii) Section 8 (Commerce Clause) of Article I of the Constitution of the United States of America.

(b) That the Maryland Use Tax Law cannot properly be construed to require the Defendant to make said collections and payments.

(c) Other reasons to be shown at the hearing on this Petition.

The Defendant further prays (a) that the Sheriff of Baltimore City be ordered to return said writ and the proceedings thereunder immediately before this Court; and (b) that [fols. 19-20] this Court shall proceed to hear this Petition and adjudicate hereon.

James Piper, William L. Marbury, Piper & Marbury, Attorneys for Defendant, 1000 Maryland Trust Building, Calvert and Redwood Streets, Baltimore 2, Maryland.

Duly sworn to by Howard A. Miller. Jurat omitted in printing.

[fol. 21] IN THE SUPERIOR COURT OF BALTIMORE CITY

[Title omitted]

ANSWER TO PETITION TO QUASH WRIT OF ATTACHMENT—Filed April 8, 1952

To the Honorable, the Judge of Said Court:

The plaintiff, by Hall Hammond, Attorney General, Francis D. Murnaghan, Jr., Assistant Attorney General, and Edward F. Engelbert, Assistant Director, Retail Sales Tax Division, Office of the Comptroller, by way of answering the Petition says:

(1) The plaintiff admits the allegations contained in paragraphs 1 and 2.

(2) The plaintiff denies the allegations appearing in sentence one of sub-paragraph (a) of the Wherefore clause, insofar as it is alleged that sales of certain tangible personal property made by the defendant to Maryland purchasers were completed in the State of Delaware.

(3) The plaintiff denies the allegations contained in sentence 2 of sub-paragraph (a) of the Wherefore clause.

(4) The remainder of the Wherefore clause contains only conclusions of law and, therefore, requires no answer.

And answering further, the plaintiff says:

(5) On or about March 10, 1952, the Comptroller of the State of Maryland, pursuant to Sections 335 and 280 of Article 81 of the Annotated Code of Maryland (1939 Edition and 1947 Supplement, as amended), assessed a final deficiency in use tax against the defendant in the amount of $356.40, $240.00 thereof representing the use tax claimed to be due, $32.40 thereof interest claimed to be due, and $84.00 thereof penalties claimed to be due for the tax period from July 1, 1947, through December 31, 1951. The present suit, by way of attachment, was instituted in order to collect said [fol. 22] tax, interest and penalties.

(6) The defendant has neither applied for revision of said assessment nor paid the tax assessed and sought a refund, as required by Article 81, Sections 335 and 287 of the Annotated Code of Maryland (1939 Edition and 1947 Supplement, as amended).

Wherefore, the plaintiff prays that the Petition be dismissed because:

(a) Sections 335 and 286 of Article 81 of the Annotated Code provide that collection of sales and use taxes may be contested only by the proceeding set forth in Article 81, Sections 335, 287 and 288.

(b) The assessment, collection and payment of the tax here involved are authorized and required by Article 81, Sections 308 through 337, inclusive, of Article 81 of the Annotated Code, and such authorization and requirement do not violate any provisions of the Constitution of the United States of America or the Constitution of the State of Maryland.

(S.) Hall Hammond, Attorney General, Francis D. Murnaghan, Jr., Assistant Attorney General, Edward F. Engelbert, Attorneys for plaintiff.

Certificate of service (omitted in printing).

[fol. 23] In the Superior Court of Baltimore City

[Title omitted]

Agreed Statement of Facts—Filed May 22, 1952

It is hereby stipulated and agreed by and between the attorneys for the above named parties and on their behalf that:

1. Defendant, Miller Brothers Company, is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at Ninth and King Streets, Wilmington, Delaware. It has no resident agent in Maryland.

2. Defendant is and for all times material to this suit has been engaged in the retail household furniture business by selling its merchandise from its only retail store located in Wilmington, Delaware.

3. The only methods of advertising used by the Defendant are the following:

(a) *Radio and Television.* The Defendant has engaged in no radio or television advertising of any sort, anywhere, since January 1, 1951. Prior to that date, the Defendant had limited radio advertising over the Wilmington, Delaware, stations. In the fall of 1950, for a period of about six weeks, the Defendant had a small amount of television advertising over Station WDEL-TV in connection with the broadcasting of football scores. The facilities of those stations are located in Delaware entirely. In the [fol. 24] radio and television advertising the Defendant has never had any script or copy which made an appeal for out-of-state business or in any way was designed directly or indirectly to appeal particularly to Maryland residents. The radio slogan adopted by the Defendant was "Furniture Fashion Makers for Delaware".

(b) *Newspapers.* The Defendant advertises regularly in the Wilmington Morning News and the Wilmington Journal every evening. It also advertises occasionally in the Wilmington Sunday Star. All of these newspapers are published in Wilmington and undoubtedly have some circulation in some portions of Maryland. The volume of such circulation is unknown to either the Plaintiff or the Defendant. In its newspaper advertising the Defendant has never used advertising copy which mentions Maryland customers or is prepared for the purpose of directly or indirectly making any special appeal to the Maryland customers. No advertising has ever been done by the Defendant in any newspapers published in Maryland.

(c) *Use of the Mails.* The Defendant uses an automatic card mailing system and with this system distributes about four pieces a year. These mailing pieces go out to everyone who has purchased from the Defendant and whose name and address is on the Defendant's records. This means that Maryland residents do receive these mailing pieces, but no specific advertising copy has ever been sent through the mails for the specific purpose of attracting Maryland buyers. No advertising copy has been sent to Maryland buyers alone and the only advertising copy which these

Maryland buyers receive is that which is sent to all customers whose names and addresses are on the records.

4. Defendant has made and does make certain sales of tangible personal property, some of which sales being the [fol. 25] subject matter of this action, to residents of the State of Maryland, who have used, consumed or stored or will use, consume or store the purchased personal property in the State of Maryland.

5. The transactions between the Defendant and the said Maryland purchasers are and have been as follows:

(a) It is the Defendant's policy never to accept telephone orders. Most of the merchandise sold by the Defendant requires personal inspection and selection, and it is for this reason that telephone orders are refused. The Defendant maintains no mail-order business and does not make use of coupons in connection with its newspaper advertising.

(b) The purchaser appears at Defendant's retail store, located in Wilmington, Delaware. In about thirty per cent (30%) of the sales the exact item selected by the customer is tagged in the store and that same item is delivered to the customer from the store, in Wilmington, Delaware. In the remainder of the sales, an item identical to that selected by the customer is delivered from the Defendant's storeroom or warehouse in Wilmington, Delaware.

(c) Delivery is made in one of three ways and no other:

(1) The article is taken away by the purchaser. Within the taxable period of July 1, 1947, through December 31, 1951, tangible personal property sold for at least $2,500 was delivered in this manner.

(2) The article is delivered in Maryland to the purchaser in a motor vehicle owned and operated by Defendant, directly from Defendant's store in Wilmington, Delaware, to the residence of the Maryland purchaser. The cost of the delivery in such a case is borne by Defendant and no charge [fol. 26] therefor is made to the purchaser. Within the taxable period July 1, 1947, through December 31, 1951, tangible personal property sold for at least $8,000 was delivered in this manner.

(3) The article is delivered in Maryland to the purchaser

by common carrier to which delivery is made by Defendant in Wilmington, Delaware. Such common carrier is usually an independent trucking line authorized to do business as a commercial carrier by the Interstate Commerce Commission. The cost of the delivery in such a case is borne by the Defendant and no charge therefor is made to the purchaser. Within the taxable period July 1, 1947, through December 31, 1951, tangible personal property sold for at least $1,500 was delivered in this manner.

6. (a) Payment for some purchases is completed at the time the purchaser appears at the Defendant's retail store and prior to the delivery.

(b) The Defendant does make sales to some Maryland residents on credit in exactly the same way as it sells to Delaware residents on credit. In the case of most of such credit sales to Maryland customers, the Defendant enters into conditional sales contracts with its Maryland customers in the same way that it enters into conditional sales contracts with its Delaware customers. In many other instances, the Defendant notes the terms of the credit transaction on the sales slip without requiring a conditional sales agreement, and this method of business is used without any distinction between Maryland and Delaware customers. This method is frequently designated as a 60 or 90-day charge account. At no time within the past eight years has the Defendant ever recorded its conditional sales contracts in Maryland.

[fol. 27] (c) The Defendant has never repossessed by legal process any furniture or other merchandise for any customers in Maryland or elsewhere within the last fifteen years. The Defendant has on occasion accepted back merchandise which has not been satisfactory to the customer. In the event of delinquency in payments, the Defendant uses collection letters, which are sent through the mails. During the past ten years the Defendant has never instituted legal action through a Magistrate's or other Court in Maryland, nor has it in that period used a collection agent in Maryland. The Defendant employs no collectors. The Maryland customers make payments to the Defendant personally at the store in Wilmington, Delaware, or by check, cash or money order sent through the mails.

(d) No C. O. D. deliveries are made.

7. Except to the extent, if any, disclosed above, Defendant does not maintain, occupy or use, nor has it ever in the past maintained, occupied or used, permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, any office, branch, place of distribution, sales or sample rooms or place, warehouse or storage place, or other place of business in the State of Maryland.

8. Except to the extent, if any, disclosed above, Defendant does not have, nor has it ever had, any representative, agent, salesman, canvasser or solicitor operating in the State of Maryland for the purpose of selling or taking any orders for tangible personal property, or delivering the same.

9. Defendant is not, nor has it ever been, qualified or registered to do business in the State of Maryland.

[fol. 28] 10. On or about March 10, 1952, the Comptroller of the State of Maryland assessed a deficiency in Use Tax against the Defendant in the amount of $356.40, $240.00 thereof representing the use tax claimed to be due, $32.40 thereof as interest claimed to be due and $84.00 thereof as a penalty claimed to be due for the tax period from July 1, 1947, through December 31, 1951, based upon all the sales referred to in paragraph 5 above.

11. Defendant has not applied for a permit nor been authorized by the Comptroller to collect any use tax under Section 312 of Article 81 of the Annotated Code of Maryland (1947 Supp.).

12. Defendant has not applied for, nor paid the license fee required to obtain, nor has been issued, a license pursuant to Sections 331-333 of Article 81 of the Annotated Code of Maryland (1947 Supp.).

13. Except as indicated above, Defendant does not engage and has not engaged in any activities in the State of Maryland.

James Piper, Wm. L. Marbury, Piper & Marbury, Attorneys for Defendant; Hall Hammond, Francis D. Murnaghan, Jr., Edward F. Engelbert, Attorneys for Plaintiff.

[fols. 29-30] IN THE SUPERIOR COURT OF BALTIMORE CITY

[Title omitted]

STIPULATION—Filed May 27, 1952

It is hereby stipulated that in the event that the Court should overrule the Defendant's petition to quash the writ of attachment, said petition shall be considered as having been refiled as a plea in bar by the Defendant appearing specially and solely for the purpose of defending its interest in the property attached, but nothing herein shall be taken as an admission on the part of the Plaintiff that the Defendant may appear specially for such a purpose.

If said petition is considered as having been refiled as a plea in bar, it is further stipulated that the request for relief in the answer of the Plaintiff to said petition shall be considered to have been amended, to read as follows:

> "Wherefore, Plaintiff prays that judgment be entered in personam against Defendant and that final judgment of condemnation be entered against the station wagon of Defendant attached in this proceeding, both judgments to be in the full amount of Plaintiff's claim in this case for use taxes, with interest and costs."
>
> (S.) James Piper, William L. Marbury, Piper & Marbury, Attorneys for Defendant, Hall Hammond, Francis D. Murnaghan, Jr., Edward F. Engelbert, Attorneys for Plaintiff.

[fol. 31] IN THE SUPERIOR COURT OF BALTIMORE CITY
STATE OF MARYLAND

vs.

MILLER BROTHERS COMPANY, a body corporate

OPINION—Filed August 11, 1952

This is an attachment proceeding by the State of Maryland to collect from Miller Brothers Company, a corpora-

tion, use taxes imposed by the Maryland Retail Sales and Use Tax Act, sections 259 to 336, inclusive, of Article 81 of the Annotated Code of Maryland (1947 Supp.), hereinafter referred to as the Act, in the amount of $356.40, which includes interest and penalty. The tax is an excise tax "levied and imposed on the use, storage or consumption in this State of tangible personal property purchased from a vendor within or without this State for use, storage or consumption within this State." The tax is required to be paid by the purchaser. It is at the rate of two cents per dollar of the sale price. (§ 309). Section 311 requires the vendor to collect the tax from the purchaser, and by Section 315 the vendor is made personally liable to the State for the amount uncollected.

The proceeding was filed under Section 156 of Article 81 of the Code, which gives the State the right to resort to attachment, whether the defendant be a resident or nonresident of the State. A station wagon of the defendant was seized by the Sheriff and appraised in this proceeding at $800.

[fol. 32] Defendant filed a motion to quash the attachment on the ground that, if the Maryland Use Tax Law be construed to require the defendant to make the collections mentioned, the law is void because it violates (1) the due process clause of the Fourteenth Amendment of the Constitution of the United States, (2) Article 23 of the Declaration of Rights of the Constitution of Maryland, and (3) Section 8 (Commerce Clause) of Article 1 of the Constitution of the United States. The State contends that the grounds to quash relate to the merits of the claim and not to a defect in the papers or procedure or the right to maintain the attachment, if the claim is valid. The case was heard on an agreed statement of facts and it was also agreed that if the motion to quash is denied the reasons given therein shall be considered as a plea in bar to the short note case. As defendant desires the substantive questions determined, the motion to quash will be denied and the short note case determined.

The agreed facts, substantially as summarized by defendant, are as follows. The period involved is July 1, 1947 to December 31, 1951. The Company (defendant) is

a Delaware corporation. It has only one store, a retail household furniture store in Wilmington, Delaware. In addition to its Delaware customers, the Company has made, during said period, and does make certain sales of tangible personal property to residents of Maryland, who have used, consumed or stored such purchased personal property in Maryland. The customers appear at such store in Wilmington, Delaware, and select the items of furniture which they wish to purchase. Some of the items sold are the very items selected by the customers, and some are identical to those selected but are delivered from the Company's storeroom or warehouse in Wilmington, Delaware. Deliveries to Maryland purchasers are made in one of the following three ways and no other:

[fol. 33] (1) The article is taken away by the purchaser. During said period tangible personal property sold for at least $2500 was so delivered.

(2) The Company delivers the article in Wilmington, Delaware, to a common carrier which delivers the article in Maryland to the purchaser. The cost of delivery is borne solely by the Company. During said period tangible personal property sold for at least $1500 was so delivered.

(3) The article is delivered in Maryland to the purchaser, in a motor vehicle owned and operated by the Company, directly from the Company's store in Wilmington, Delaware, to the residence of the Maryland purchaser. The cost of delivery is borne solely by the Company. During said period tangible personal property sold for at least $8000 was so delivered.

Payment for some purchases is completed at the time the purchaser appears at the Company's retail store and prior to the delivery. Other sales are made on credit including some sales made to customers who reside in Maryland. In some such cases, including some sales to Maryland customers, the Company enters into conditional sales contracts and in others the terms of the credit transactions are simply noted on a sales slip, in which case the transaction is frequently designated as a sixty or ninety-day charge account.

The Company employs no solicitors or salesmen who operate in the State of Maryland. It has from time to

time mailed advertising matter to its customers whose names and addresses are on its records, including those who reside in Maryland, it has advertised regularly in newspapers published in Wilmington, Delaware, which have some circulation in some parts of Maryland, and it has broadcast programs containing radio or television advertising over stations located in Wilmington, Delaware, and these programs could have been received within the State [fol. 34] of Maryland. No special solicitation has ever been directed to Maryland residents. The Company has never qualified or registered to do business in the State of Maryland nor has it any assets physically located in this State. The station wagon attached in this particular case is used by the Company in making deliveries to its customers.

Most of the pertinent sections of the law are as follows:

> 311. Every vendor engaging in business in this State and making sales of tangible personal property for use, storage or consumption in this State which are taxable under the provisions of this sub-title, at the time of making such sales, or if the use, storage or consumption is not then taxable hereunder, at the time when such use, storage or consumption becomes taxable hereunder, shall collect the tax imposed by this sub-title from the purchaser.
>
> 308(k). 'Engaged in business in this State' means the selling or delivering in this State, or any activity in this State in connection with the selling or delivering in this State, of tangible personal property for use, storage or consumption within this State. This term shall include, but shall not be limited to the following acts or methods of transacting business.
>
> (1) The maintaining, occupying or using, permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, of any office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.
>
> (2) The having of any representative, agent, salesman, canvasser, or solicitor operating in this

State for the purpose of selling, delivering, or the taking of orders for any tangible personal property.

313. Every vendor required or permitted to collect the tax shall collect the tax imposed by the provision of this sub-title, notwithstanding the following:

(a) That the purchaser's order or the contract of sale is delivered, mailed, or otherwise transmitted by the purchaser to the vendor at a point outside of this State as a result of solicitation by the vendor through the medium of a catalog or other written advertisement; or

(b) That the purchaser's order or contract of sale made or closed by acceptance or approval outside of this State or before said tangible personal property enters this State; or

[fol. 35] (c) That the purchaser's order or contract of sale provides that said property shall be, or it is in fact, procured or manufactured at a point outside of this State and shipped directly to the purchaser from the point of origin; or

(d) That said property is mailed to the purchaser in this State from a point outside this State or delivered to a carrier at a point outside this State, F.O.B., or otherwise, and directed to the vendor in this State, regardless of whether the cost of transportation is paid by the vendor or by the purchaser; or

(e) That said property is delivered directly to the purchaser at a point outside this State, if it is intended to be brought to this State for use, storage or consumption in this State.

324. The vendor or person subject to tax as provided in this sub-title shall be entitled to apply and credit against the amount of tax payable by him as stated in Section 323, an amount equal to three per cent (3%) of the gross tax to be remitted to the Comptroller to cover the expense in the collection and remittance of said tax; provided, however, that nothing contained in this section shall apply to any vendor or

person who shall fail or refuse to file his return with the Comptroller within the time prescribed by Sections 320 and 322 of this sub-title.

The defendant makes two principal contentions, (1) that as a matter of construction the Act is not applicable to it because it is not "engaging in business in this State" and (2) if the Act is construed to apply to it because it is "engaging in business in this State" then the Act is invalid because it violates the Federal and Maryland Constitutions in the respects above mentioned.

Before these questions are determined it is necessary to consider the contention of the State that the defenses set up by the defendant can not be considered in this proceeding because the defendant has not followed the procedure set forth in the Act to have its liability and the amount thereof reviewed by the Comptroller, and, if dissatisfied, by the appropriate court and eventually the Court of Appeals.

[fol. 36] The State relies on Sections 286, 287 and 288 of Article 81, which were enacted as part of the Act. Section 287 provides that "any taxpayer may apply to the Comptroller for revision of the tax assessed against him", who is then required to take such action as he deems just and notify the taxpayer of the action taken. The latter may within a specified time request a formal hearing before the Comptroller. After the hearing the Comptroller is required to make a determination and notify the taxpayer. Section 288 provides that the taxpayer, if dissatisfied with the determination of the Comptroller, may, within a time specified, appeal "to the Circuit Court for the County in which the taxpayer regularly conducts his business, or to the Baltimore City Court if the taxpayer regularly conducts his business in Baltimore City. Such appeal shall be limited to questions of law only * * *." If the taxpayer or the State is dissatisfied with the determination of the Court either may appeal to the Court of Appeals of Maryland.

Section 286 is as follows:

"No injunction or writ of mandamus or other legal or equitable process shall issue in any suit, action or

> proceeding in any court against this State or any officer or employee thereof to prevent or enjoin the collection under this sub-title of any tax sought to be collected, and no suit or proceeding shall be maintained in any court by any taxpayer for the recovery of any amount of taxes alleged to have been erroneously or illegally assessed or collected except as is provided by Sections 287-288, inclusive, of this subtitle."

With respect to the latter section defendant's position is that it has no relation to the present proceeding, because this is not a suit, action or proceeding against the State of Maryland or any officer or employee thereof, nor is any injunction or writ of mandamus or other legal or equitable process sought against the State or any officer or employee [fol. 37] thereof; and that this is not a suit or proceeding by a taxpayer for the recovery of taxes alleged to have been erroneously or illegally collected. That in this case defendant is seeking merely to defend its property.

Defendant also contends that Sections 287 and 288 are based on the assumption that defendant was engaged in the regular conduct of business in Baltimore City or in one of the counties and that such is not legally correct. Therefore, in order to invoke the right of appeal to the courts under Section 288, defendant would have been compelled to make a concession which would not only be contrary to fact but which would be highly prejudicial to its entire case, since it claimed the invalidity of the State's imposition of the tax on defendant arises out of the very fact that defendant is not conducting its business within Maryland. Therefore an application to the Comptroller would be sterile because defendant would have no means of court review as it does not regularly conduct its business in any of the subdivisions of the State.

Defendant refers to *Schneider* v. *Pullen*, 81 A.2d 226 (1951) in which the Court sustained the right of a person conducting a trade school to seek a declaratory decree as to the invalidity of a statute and regulations thereunder, requiring private trade schools to obtain certificates from the State Superintendent of Schools. The Court held

"that where a special form of remedy is provided, the litigant must adopt that form and must not bypass the administrative body or official by pursuing other remedies." But it was held "that where constitutional questions are involved, the litigant has the right to raise them", the Court "has the right to consider them", and "the legislature cannot interfere with the judicial process by de- [fol. 38] priving litigants from raising questions involving their fundamental rights in any appropriate judicial manner, nor can it deprive the courts of the right to decide such questions in an appropriate proceeding."

The State insists that the last mentioned case involved complete invalidity of the statute as to everyone and not its inapplicability to particular persons. After consideration of the arguments of the parties and the cases cited by them on this point, I conclude that defendant has the right to defend this suit by raising the constitutional questions above mentioned. Section 286 is not applicable; defendant is not taking the initiative but is merely defending its property. Sections 287 and 288 seem to relate to persons who, admitting they are subject to the Act, dispute the correctness of the proposed assessment. In any event said sections do not prevent a person resisting on constitutional grounds an asserted claim of liability against him.

The defenses to the claim will now be considered.

1. Defendant advances a construction of the Act which would avoid deciding the constitutional questions which it has raised. The contention is that its activities in the State and in connection with sales of merchandise and deliveries thereof to residents of the State do not constitute "engaging in business in this State" which is used in Section 311 and elsewhere in the Act. Reference is made to Section 308(k) which defines the meaning of "engaged in business in this State" as "the selling or delivering in this State, or any activity in this State in connection with the selling or delivering in this State, of tangible personal property for use, storage or consumption within this State." The section also states that the term should include, *but shall not be limited to,* the following acts or [fol. 39] methods of transacting business. There are then set forth in two paragraphs certain "acts or methods of

transacting business." Defendant says it is not engaged in any of such acts or methods. It is specifically stated in the Act that the meaning of the term quoted is not limited to the particular acts or methods of transacting business. It is also argued that provisions in other sections of the Act imply the maintenance of a place of business within this State.

In *General Trading Co.* v. *State Tax Commission of Iowa*, 322 U. S. 335, it appears from the opinion of the Supreme Court of Iowa, 233 Iowa 877, that a "retailer maintaining a place of business in this state" was required to collect the use tax on the sale price of property which it sold to a purchaser in Iowa. The Court in deciding the question raised here said:

> "The contention is that defendant is not a 'retailer maintaining a place of business in this state,' as defined by paragraph 6 of said section 6943.102. The answer asserts facts from which it appears that, if the phrase were to be given its ordinary meaning, defendant is not such a retailer. But we are dealing with a statutory definition. The Tax Commission points out that the statute provides that a 'retailer maintaining a place of business in this state' shall include 'any retailer having * * * within this state * * * any agent operating within this state under the authority of the retailer * * * irrespective of whether such * * * agent is located here permanently or temporarily, or whether such retailer * * * is admitted to do business within this state.' The language is sufficient to include defendant within the terms of the statutory definition. We cannot shut our eyes to the words of the statute. The use of the words is the prerogative of the legislature. Our only function is to interpret the words which it has used. The trial court was right in holding that defendant's operations bring it within the letter and the language of the statute." (pp. 880-881)

The Supreme Court accepted the lower appellate court's finding (322 U. S. 335). In that case the vendor maintained no place of business and was not qualified or registered

to do business in that state. It sent traveling salesmen from Minnesota into Iowa, none of whom lived in Iowa or had [fol. 40] headquarters there. They solicited orders for merchandise in Iowa which orders were subject to acceptance or rejection at vendor's office in Minnesota. The salesmen were not authorized to make, and did not make, any contracts in Iowa. In filling such orders as were accepted merchandise was shipped from Minnesota into Iowa by delivery to common carriers, truck or rail, or by delivery to United States Postal Department; the purchasers paid all costs of transportation by carrier or parcel post.

I do not construe the phrase "engaged in business in this State" as meaning the same as doing business in the state in the sense of being suable there and subject to process on claims growing out of transactions in other states. The facts in the General Trading Company case and the case at bar are not importantly different. In that case the physical presence of employees or agents of the vendor in Iowa preceded the contract of purchase and consisted of solicitation. In the case at bar the solicitation was made by mail but the deliveries were made by defendant's agent or employee in its own truck or, at the expense of defendant, by common carrier. I, therefore, find that defendant is engaged in business in this state within the meaning of the Act.

2. It is contended by defendant that it is not doing business in Maryland in the sense that these words have always been understood by our Court of Appeals, and that there is grave doubt that the legislature could define the term in such a way as to include defendant without violation of Article 23 of the Declaration of Rights. The exact point as expressed by defendant does not have to be [fol. 41] resolved. In the first place there is nothing in the Act to indicate that the legislature in using the expression "engaged in business in this State" had reference to the much older expression "doing business in this State." The two phrases have different connotations, depending upon the context in which they are used and the subject matter. Doing business in the State so as to be subject to the local jurisdiction for the purpose of service of process and suit in the State (*M. J. Grove Lime Co.* v.

Wolfenden, 171 Md. 299), is essentially different from engaging in business for the purpose of collecting the use tax. Without further elaboration, I find no violation of Article 23 of the Maryland Declaration of Rights.

3. Sales taxes are not new. They have been the subject of judicial consideration, according to Mr. Justice Stone in *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 51 (1940), for more than seventy years. Their asserted invalidity is almost always based on the Commerce Clause and the Fourteenth Amendment. In recent years the necessity of finding new sources of revenue has caused more states to resort to a sales tax law and its complement, use tax law, and, in connection with the latter, to endeavor to require out of state vendors to collect from purchasers the tax on merchandise which the vendor delivers in the state. Many of the latter situations have been submitted for judicial determination as to their validity under the Federal Constitution. In such tests of constitutionality the boundary line is narrow. A situation in a particular case, which was thought to be the reason for the result, has been brushed aside as irrelevant or unimportant in later cases. This judicial process has greatly clarified a complicated but important subject matter. No useful purpose would be served in analyzing and discussing all of the numerous cases cited by counsel. A reference to some of the more recent cases should be sufficient.

[fol. 42] The teaching of the cases is that considering the necessity of reconciling the competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed, it is only when state action amounts to an undue regulation or burden that it violates the Commerce Clause. The subject of state power in relation to the Commerce Clause is very fully elaborated by Mr. Justice Stone in the McGoldrick case and most of the sales and related tax cases are cited and discussed. Rather full excerpts from the opinion of some of the basic and fundamental matters at this point of the discussion may be helpful.

That case involved a sales tax enacted by New York City of 2% of each sale, imposed on the purchaser, and required

the seller to collect it for the City. "Sale" was defined as "any transfer of title or possession, or both * * * in any manner or by any means whatsoever for a consideration or any agreement thereof." Defendant, a Pennsylvania corporation, maintained a sales office in New York City. It mined coal in Pennsylvania and shipped by rail to dock in Jersey City and thence by barge to customers in New York City. All the sales contracts with the New York customers were entered into in New York City. In sustaining the validity of the law the Court said:

> "Section 8 of the Constitution declares that 'Congress shall have power * * * to regulate commerce with foreign Nations, and among the several States * * *' In imposing taxes for state purposes a state is not exercising any power which the Constitution has conferred upon Congress. It is only when the tax operates to regulate commerce between the states or with foreign nations to an extent which infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations. See [fol. 43] *Gibbons* v. *Ogden*, 9 Wheat. 1, 187; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 185. Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce, and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states."
>
> "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, *Western Live Stock* v. *Bureau*, 303 U. S. 250, 254. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of

the regulation of the commerce which the Constitution leaves to Congress."

After referring to a number of state taxes which had been upheld, the Court continued:

"In few of these cases could it be said with assurance that the local tax does not in some measure affect the commerce or increase the cost of doing it. But in them as in other instances of constitutional interpretation so as to insure the harmonious operation of powers reserved to the states with those conferred upon the national government, courts are called upon to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed.

* * * * * * *

It [New York tax] does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved in interstate commerce, sustained in *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86; *Henneford* v. *Silas Mason Co., supra; Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167."

[fol. 44] In the colloquy between counsel and the Court at the hearing, counsel for defendant admitted that ultimately the constitutional defenses above mentioned depend upon a finding that the difference in the facts in the case at bar

and the facts in the *General Trading Company* case require a different legal conclusion. After careful study of the numerous Supreme Court decisions, I regard the difference between the two cases as unimportant with respect to the constitutional questions involved. It would seem from the "group" of sales and use tax cases that there must be some activity on the part of the ex-state vendor in the state in which the purchaser resides in order to give the latter state jurisdiction over said vendor. It would also appear that in considering the constitutional defenses mentioned there is a difference between a sales tax *as such* imposed on the ex-state vendor and a use tax imposed on the purchaser, with respect to which the ex-state vendor is required to be the tax collector for the state imposing the tax. Compare *General Trading Co.* v. *State Tax Commission of Iowa, supra*, and *McLeod* v. *Dilworth Co.*, 322 U. S. 327, in which, from an examination of the appellate court opinions of Iowa and Arkansas, 233 Iowa 877 and 205 Arkansas 780, and the Supreme Court opinions in these cases, the method of doing business and the activity of the ex-state vendors in the taxing states seem to be identical.

In General Trading Company case the solicitation in the state was by traveling salesmen from Minnesota. The orders that were obtained were subject to acceptance or rejection at the vendor's office in Minnesota. The orders which were accepted were shipped F.O.B. the Minnesota office. In the instant case the Maryland purchasers are solicited by advertising matter sent through the mail. Obviously orders must be accepted at the Wilmington office of the defendant. In General Trading Company delivery was made by postal authorities and common car- [fol. 45] rier at the expense of the purchaser. In the instant case some deliveries are similarly made, *i.e.*, common carrier, at the expense of defendant; most of the deliveries are made at the residence of the Maryland purchasers by the agent of defendant in its truck, which of course has to enter and use the facilities of Maryland to do so. There is, therefore, activity on the part of defendant in Maryland in the solicitation of orders and there is physical entrance into the state for the purpose of delivering the merchandise ordered. To require defendant to collect the use tax on such

merchandise as it delivers in the state, either by its own vehicle or by engaging a common carrier at its expense, does not in my opinion unduly regulate or burden or discriminate against interstate commerce so as to make the Act invalid under the Commerce Clause.

In 1941 the cases of *Nelson* v. *Sears Roebuck & Co.* and *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 359 and 373, were decided. The facts were substantially the same in the two cases. Each mail order house maintained stores and conducted business in Iowa. They disputed the constitutional right of Iowa to require it to collect a use tax with respect to merchandise ordered directly by residents of Iowa from out of state branches of the vendors, which orders were filled by direct shipments by mail or common carrier from the branches to the purchaser, it being admitted that such orders were not solicited or placed by any of the vendor's agents in Iowa. In sustaining the obligation of the vendors to collect the use tax for Iowa on such mail order business, the Court said:

> [fol. 46] "Respondent, however, insists that the duty of tax collection placed on it constitutes a regulation of and substantial burden upon interstate commerce and results in an impairment of the free flow of such commerce. It points to the fact that in its mail order business it is in competition with out of state mail order houses which need not and do not collect the tax on their Iowa sales. But those other concerns are not doing business in the state as foreign corporations. Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price. Respondent further stresses the cost to it of making these collections and its probable loss as a result of its inability to collect the tax on all sales. But cost and inconvenience inhered in the same duty imposed on the foreign corporations in the *Monamotor* and *Felt & Tarrant* cases. And so far as assumed losses on tax collections are concerned, respondent is in no position to found a constitutional right on the practical opportunities for tax avoidance which its method of doing business affords Iowa residents, or

to claim a constitutional immunity because it may elect to deliver the goods before the tax is paid.

"Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions. Particular facts of specific cases determine whether a given tax prohibitively discriminates against interstate commerce. Hence a review of prior adjudications based on widely disparate facts, howsoever embedded in general propositions, does not facilitate an answer to the present problem." (pp. 365-366)

After the Nelson cases the effort was made to distinguishing other use tax cases because of the difference in the method of conducting the business. These efforts were brushed aside by Mr. Justice Frankfurter, speaking for the majority in the General Trading Company case, supra, pp. 337-339, as follows:

"We brought the case here, 320 U. S. 731, to meet the claim that there was need for further precision regarding the scope of our previous rulings on the power of States to levy use taxes. In view, however, of the clear understanding by the court below that the facts we have summarized bring the transaction within the taxing power of Iowa, there is little need for elaboration. We agree with the Iowa Supreme Court that *Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62; *Nelson* v. *Sears, Roebuck & Co., supra;* and *Nelson* v. *Montgomery Ward & Co., supra*, are controlling. The *Gallagher* case is indistinguishable—certainly nothing can turn on the more elaborate arrangements for soliciting orders for an intricate machine for shipment from without a State as in the *Gallagher* case, compared with the comparatively simpler needs for soliciting business in this case. [fol. 47] And the fact that in the *Sears Roebuck* and *Montgomery Ward* cases the interstate vendor also had retail stores in Iowa, whose sales were appropriately subjected to the sales tax, is constitutionally irrelevant to the right of Iowa sustained in those cases to exact a use tax from purchasers on mail order goods forwarded into Iowa from without the State. All these differentiations are without constitutional significance.

Of course, no State can tax the privilege of doing interstate business. See *Western Live Stock* v. *Bureau*, 303 U. S. 250. That is within the protection of the Commerce Clause and subject to the power of Congress. On the other hand, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a State to the upkeep of which he may be asked to bear his fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce. See *Best & Co.* v. *Maxwell*, 311 U. S. 454.

"None of these infirmities affects the tax in this case any more than it did in the other cases with which it forms a group. The tax is what it professes to be—a non-discriminatory excise laid on all personal property consumed in Iowa. The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer—the Iowa resident who is paying taxes to sustain his own state government. To make the distributor the tax collector for the State is a familiar and sanctioned device. *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 93-94; *Felt & Tarrant Co.* v. *Gallagher, supra.*

The power of a state to require the ex-state distributor to collect the use tax as its agent was also sustained in *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, referred to therein as "a common and lawful arrangement"; *Felt & Tarrant* v. *Gallagher*, 306 U. S. 62; *McGoldrick* v. *Berwind-White, supra.*

Defendant denies the jurisdiction of Maryland over it on the ground that it must be found that defendant is engaged in business in Maryland, and a prerequisite to such finding is that its solicitation or deliveries in Maryland must be regular, continuous and persistent, which terms are used in *Nippert* v. *City of Richmond*, 327 U. S. 416, involving a municipal ordinance imposing a license tax on solicitors, which was held to violate the Commerce Clause.

[fol. 48] Whether either solicitation or deliveries are regular, continuous or persistent is necessarily relative, depending upon the particular business. No point to that effect was made in *General Trading Company*, and in the instant case the agreed facts do not show that there was not such an activity by defendant. According to the agreed facts, solicitation by mail occurred four times a year, while there are no details with respect to deliveries except the admitted fact that the deliveries by common carrier of merchandise sold for $1500 and by the company's own vehicle of merchandise sold for $8000 constitutes almost 80% of all tangible personal property sold during the period in question to residents of Maryland. I cannot find from the agreed facts, considering the nature of defendant's business, that its solicitations and deliveries in Maryland were not regular and continuous as opposed to casual and spasmodic. Indeed it is implied in *Nippert* v. *Richmond*, *supra*, page 426, that the making of delivery, if it consists of a course of business, may constitute "doing business" in the state.

4. I, therefore, conclude that the State has jurisdiction to require defendant to collect for it the use tax on tangible personal property which it delivers in Maryland by its own truck or by common carrier. I also conclude that the State has no jurisdiction over defendant with respect to such property purchased by Maryland residents at Wilmington and personally brought by such residents into Maryland. This question was mentioned but not decided in a foot note in *Nelson* v. *Montgomery Ward & Co.*, *supra*, page 374. The exact question was whether Montgomery Ward & Co., which qualified and was doing business in Iowa, could be required to collect the tax on sales made by its other stores lo-[fol. 49] cated in other states near the Iowa border. In the dissenting opinion of one judge of the Supreme Court of Iowa, 228 Iowa 1303, who took the same view as the Supreme Court of the United States as to the mail order sales, it was said that the imposition on the vendor of such "an almost impossible task" would be "a burden so unreasonable, arbitrary and capricious as to invade its constitutional rights under the due process clause of the Federal Constitution" and would, therefore, be invalid. I think

the Maryland Act cannot reach such transactions because Maryland can not project its jurisdiction into another state, even though the latter is so near the Maryland border that some residents of the latter may circumvent the Use Tax Act.

The latter conclusion does not, however, affect the right of the State to recover the assessment against defendant on such sales which, according to the stipulation, amount to $2500 during the period in question. As the defendant has been found to be "engaged in business" within the meaning of the Act, the Comptroller had the legal right to make the deficiency assessment against it, and impose the interest and penalties that are included in the amount involved in the short note case. In the light of the conclusion defendant could have proceeded under the above mentioned Sections 287 and 288 of Article 81 to have this particular assessment revised. It, therefore, should have pursued the administrative remedies with respect to said item. Defendant elected to stand on what it considered its constitutional rights and defend against the effort to collect *any* of the claim from it. I think it had the right to do so, but, after it is found to be subject to the Act, it is too late to have the *amount* of its liability revised and [fol. 50] redetermined. However, as this is in the nature of a test case, its future conduct can be governed accordingly.

A formal order may be presented for the entry of judgment in the short note case for the plaintiff for the amount of its claim with interest and costs.

S. Ralph Warnken.

[fols. 51-54] In the Superior Court of Baltimore City

[Title omitted]

Order—Filed August 19, 1952

Ordered, this 19th day of August, 1952, by the Superior Court of Baltimore City, that judgment be entered for the Plaintiff in the amount of Three hundred and sixty-three dollars, with interest from date and costs in this action.

S. Ralph Warnken.

Approved as to form:

Piper & Marbury, By: James Piper, Attorneys for Defendant; (S.) Hall Hammond, Attorney General, Francis D. Murnaghan, Jr., Assistant Attorney General, Attorneys for Plaintiff.

[fol. 55] In the Superior Court of Baltimore City

[Title omitted]

Order—Filed September 17, 1952

Upon the foregoing Petition and Consent, it is ordered this 17th day of September, 1952, by the Superior Court of Baltimore City that the petition to quash and set aside the writ of attachment be and the same is hereby denied *nunc pro tunc* as of August 19, 1952, and that the Clerk of said Court be and he is hereby ordered to correct, *nunc pro tunc*, his records, to show the effective date of said order to be August 19, 1952, so that the entry will read:

"19 August 1952. Order of Court denying Defendant's petition to quash and set aside writ of attachment. Order of Court filed."

S. Ralph Warnken.

[fol. 56] In the Superior Court of Baltimore City

[Title omitted]

Order of Appeal—Filed September 17, 1952

Mr. Clerk:

Enter an Appeal to the Court of Appeals of Maryland on behalf of the Defendant, Miller Brothers Company, from the judgment dated August 19, 1952, for the Plaintiff in the above short note case of State of Maryland v. Miller Brothers Company.

James Piper, William L. Marbury, Piper & Marbury, Attorneys for Defendant, 1000 Maryland Trust Building, Calvert and Redwood Streets, Baltimore 2, Maryland.

Certificate of service (omitted in printing).

[fol. 57] In the Superior Court of Baltimore City

[Title omitted]

Order of Appeal—Filed September 18, 1952

Mr. Clerk:

Enter an Appeal to the Court of Appeals of Maryland on behalf of the Defendant, Miller Brothers Company, from the Order of the Court dated September 17, 1952, denying *nunc pro tunc*, as of August 19, 1952, Defendant's petition to quash and set aside the writ of attachment in this attachment case.

James Piper, William L. Marbury, Piper & Marbury, Attorneys for Defendant, 1000 Maryland Trust Building, Calvert and Redwood Streets, Baltimore 2, Maryland.

Certificate of service (omitted in printing).

[fols. 58-59] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 60] In the Court of Appeals of Maryland, October Term, 1952

No. 93

Miller Brothers Company

v.

State of Maryland

Judge Delaplaine Delivered the Opinion of the Court—Filed March 11, 1953

These two appeals test the constitutionality of the Maryland Use Tax Act, Code 1951, art. 81, secs. 368-396, as applied to furniture sold by appellant, Miller Brothers

Company, a Delaware corporation, at its store in Delaware and delivered to purchasers residing in Maryland.

The tax is an excise imposed by the Legislature on "the use, storage or consumption in this State of tangible personal property purchased from a vendor within or without this State * * * for use, storage or consumption within this State." The Act expressly provides in Sec. 369 that the tax shall be paid by the purchaser and shall be computed as follows: (a) on each sale where the price is from 51 cents to $1, both inclusive, 2 cents; (b) on each 50 cents of price or fraction thereof in excess of $1, 1 cent. The tax is paid by the purchaser to the vendor, as trustee for the State, and the vendor is liable for the collection for the State.

The State entered suit against appellant on March 19, 1952, to recover $356.40 assessed by the State Comptroller as deficiency in use tax in the period from July 1, 1947, to December 31, 1951. The State also filed a non-resident attachment suit against appellant and attached a station wagon owned by it. Appellant, appearing specially, [fol. 61] filed a petition to quash the writ of attachment on the ground that the assessment was unconstitutional. The State answered that appellant had neither applied for a revision of the assessment nor paid the tax and applied for a refund, and prayed that the petition to quash be dismissed because (1) the collection of use taxes may be contested only by the proceeding set forth in the statute, and (2) the assessment was authorized by statute and was constitutional.

In the short note case the Court entered judgment in favor of the State for $363, and in the attachment case it passed an order denying the petition to quash. We have been asked to review both the judgment and the order.

At the outset the State made the objection that if appellant desired to contest the assessment, it should have applied to the State Comptroller for a revision of the assessment; and that, having failed to do so, it was precluded from contesting it in the attachment case. It is entirely true that the courts do not favor the by-passing of administrative agencies, except where there is a clear necessity for a prior judicial decision. We have accordingly held that

where a special form of remedy is provided by statute, the litigant should resort to that form rather than pursue other remedies, although where a constitutional issue is raised, and there is no danger of by-passing administrative action, the question may properly be decided in a suit for injunction or declaratory decree before the time has arrived for invoking the statutory remedy. Kahl v. Consolidated Gas, Electric Light & Power Co., 191 Md. 249, 258, 60 A. 2d 754; Commissioners of Cambridge v. Eastern Shore Public Service Co., 192 Md. 333, 64 A. 2d 151; Francis v. MacGill, Md., 75 A. 2d 91; Kracke v. Weinberg, Md., 79 A. 2d 387; Schneider v. Pullen, Md., 81 A. 2d 226; Reiling v. State Comptroller, Md., 94 A. 2d 261.

The Retail Sales Tax Act and the Use Tax Act provide that any taxpayer may apply to the Comptroller for revision of the tax assessed against him, and the Comptroller shall [fol. 62] act promptly upon the application and notify the taxpayer of his action. Any taxpayer dissatisfied with the final determination of the Comptroller may appeal therefrom to the Circuit Court for the County in which the taxpayer regularly conducts his business or to the Baltimore City Court if the taxpayer regularly conducts his business in Baltimore City. The taxpayer, or the Attorney General on behalf of the State, or the Comptroller may, within 30 days from the final order entered by the Court, appeal to the Court of Appeals of Maryland. Code 1951, art. 81, secs. 347, 348, 394.

Appellant is a foreign corporation. It has never qualified or registered to do business in Maryland and has no resident agent in this State. It is engaged in the retail household furniture business. It has only one store, which is located in Wilmington. It does not maintain any office, branch store, warehouse or other place of business in Maryland. It has no salesman or other employee in Maryland. It does not maintain a mail-order business or accept orders by telephone, as most of the merchandise sold by it requires personal inspection and selection. It has, however, mailed from time to time advertising matter to its customers, including those who reside in Maryland. If merchandise purchased by a resident of Maryland is not taken away by the purchaser, the seller delivers it by its own

motor vehicle or by common carrier. As appellant has not been regularly conducting its business in any County of the State or in Baltimore City, within the meaning of Section 348, it could not have followed the statutory procedure. Therefore, appellant was not precluded from challenging the validity of the assessment in the attachment case.

Appellant urged that it was not the intention of the Legislature to put the burden of collecting use taxes upon a foreign corporation which does not engage in any activity in Maryland except delivery of merchandise. It is true that even the solicitation of business in Maryland by an agent of a foreign corporation, without other substantial activities within the State, does not constitute "doing business" in the State within the meaning of the For- [fol. 63] eign Corporation Law so as to subject itself to the State forum. Code 1951, art. 23, sec. 88; M. J. Grove Lime Co. v. Wolfenden, 171 Md. 299, 303, 188 A. 794; Shaughnessy v. Linguistic Society of America, Md., 84 A. 2d 68, 71. But here we are dealing with a statute which is far broader in its application.

Section 371 of the Act provides: "Every vendor engaging in business in this State and making sales of tangible personal property for use, storage or consumption in this State which are taxable under the provisions of this subtitle, at the time of making such sales, or if the use, storage or consumption is not then taxable hereunder, at the time when such use, storage or consumption becomes taxable hereunder, shall collect the tax imposed by this sub-title from the purchaser."

Section 368(k) defines the term "engaged in business in this State" as the selling or delivering in this State, or any activity in this State in connection with the selling or delivering in this State, of tangible personal property for use, storage or consumption within this State.

In view of this unusually broad definition of "engaged in business," we must hold that the statute is applicable to appellant, because it delivered merchandise to purchasers in Maryland.

We now consider the basic question whether the Maryland use tax infringes Article I, Section 8 of the Constitution of the United States, which vests in Congress the

power to regulate commerce with foreign nations and among the several States. This provision of the Constitution was designed by the framers to eliminate the barriers which had been erected by the States to the freedom of movement across State borders. While the Constitution grants to Congress the power to regulate commerce among the States, it does not say what the States can do or cannot do in the absence of Congressional action. It may be generally stated, however, that while the Commerce Clause forbids a State to impose taxes directly on interstate commerce, it does not absolutely prevent the [fol. 64] imposition of State taxes which, under certain circumstances, may have some incidental effect upon such commerce. The State cannot use its taxing or police power with the aim and effect of establishing an economic barrier against competition with the products of another State. The importer must be free from taxes which are imposed for the purpose of suppressing competition from outside the State and which lead to the suppression intended. It has been said that no formula can be devised for determining in all cases whether or not a State tax is prohibited by the Commerce Clause, and that the question is inherently a practical one depending for its decision on the facts of each particular case. J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 924, 82 L. Ed. 1365, 117 A. L. R. 429.

Taxes on sales of personal property have been upheld by the United States Supreme Court in decisions extending back to 1869, when the Court, speaking through Justice Miller in Woodruff v. Parham, 8 Wall. 123, 19 L. Ed. 382, held that an ordinance of the City of Mobile, Alabama, authorizing the collection of a tax on sales at auction was valid as applied to goods which were products of other States. Since that time the Court has uniformly sustained a tax imposed by the State of the buyer upon a sale of goods effected by delivery to the purchaser upon arrival at destination after an interstate journey. In referring to that ruling, Justice Stone said in McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388, 394, 395, 84 L. Ed. 565: "It ha the support of reason and of a due regard for the just balance between national and state

power. In sustaining these taxes on sales emphasis was placed on the circumstances that they were not so laid, measured or conditioned as to afford a means of obstruction to the commerce or of discrimination against it, and that the extension of the immunity of the commerce clause contended for would be at the expense of state taxing power by withholding from taxation property and transactions within the State without the gain of any needed protection to interstate commerce."

[fol. 65] In Henneford v. Silas Mason Co., 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814, the Court held that in its application to machinery, materials and supplies purchased at retail in other States by contractors and brought into the State of Washington for use in construction, a State tax of 2 per cent of the purchase price, including the cost of transportation, for the privilege of using any article of tangible personal property within the State was not a tax on the operations of interstate commerce, but a tax on the privilege of use after such commerce was at an end, and therefore did not unlawfully burden interstate commerce. The Court explained that the right to use property is only one of the privileges making up ownership, and the fact that the tax laid upon the use of personal property purchased at retail, either within or without the State, was called an excise did not make the State's power to impose it less under the Commerce Clause than if it had been called a property tax.

In Pacific Telephone & Telegraph Co. v. Gallagher, 306 U. S. 182, 59 S. Ct. 396, 83 L. Ed. 595, the Court held that a California use tax, imposing an excise on the consumer for the use, storage or consumption in California of tangible personal property purchased from any retailer, did not infringe the Commerce Clause in its application to equipment, materials and supplies purchased outside California by a California corporation operating a telephone and telegraph system in interstate and intrastate commerce and shipped to it in interstate commerce at various points within the State.

In Nelson v. Sears, Roebuck & Co., 312 U. S. 359, 61 S. Ct. 586, 85 L. Ed. 888, the Court held that where a New York corporation was doing business in Iowa through its

retail stores, the fact that a sale by one of its mail-order houses located outside Iowa to a customer within the State was made outside the State did not preclude application of the use tax thereto on the ground that the purchaser employed agencies of interstate commerce to effectuate the purchase.

[fol. 66] In Nelson v. Montgomery Ward & Co., 312 U. S. 373, 61 S. Ct. 593, 85 L. Ed. 897, the Court held that the Iowa Use Tax Act was not unconstitutional as applied to mail-order sales solicited by an Illinois corporation through advertising by its stores in Iowa, although the orders were sent to out-of-State mail-order houses and were filled by shipments to customers in Iowa, since the corporation could not thus escape the tax exacted by Iowa as a price of enjoying benefits flowing from its Iowa business.

In line with these decisions, we hold that the Maryland Use Tax Act, as applied to appellant's sales of furniture delivered to purchasers residing in Maryland does not unlawfully interfere with interstate commerce. Of course, we recognize that the Commerce Clause prevents the State not only from enacting legislation that constitutes a direct burden on interstate commerce, but also from imposing any heavier burden on products brought into the State from other States than it imposes upon similar products of their own territory. It is well established that a State tax on merchandise brought into the State from another State or upon its sales after it has reached its destination is lawful only when the tax is not discriminatory in its incidence against the merchandise because of its origin in another State. Sonneborn Bros. v. Cureton, 262 U. S. 506, 43 S. Ct. 643, 646, 67 L. Ed. 1095; Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511, 55 S. Ct. 497, 502, 79 L. Ed. 1032, 101 A. L. R. 55. However, a use tax statute, as applied to property purchased outside the State and brought into the State by the seller and used therein by the purchaser in conducting its business, is not discriminatory and hence does not offend the Commerce Clause where the tax is not exacted upon any article the sale or use of which has been subjected to a tax equal to or in excess of the challenged tax, whether under the laws of the State imposing the challenged tax or those of any other State.

Appellant has failed to show that the Maryland use tax is discriminatory. This tax is complementary to the retail sales tax. Code 1951, art. 81, secs. 320-367. Section 370 of [fol. 67] the Use Tax Act specifically exempts from the use tax all personal property upon which a retail sales tax has been paid to the State of Maryland. It is one of the functions of the integrated sales and use taxes to remove the temptation of buyers to place their orders in other States in the effort to escape payment of the tax on local sales. The fact that the buyer employs agencies of interstate commerce to effectuate his purchase is not material, since the tax is imposed on the privilege of use, storage or consumption of property after the commerce is ended. The statute taxes the use, storage or consumption of the property in the State of Maryland, regardless of the time when the tax is required to be paid.

The final contention is that the assessment violates the Due Process Clause of the Fourteenth Amendment of the Federal Constitution and also Article 23 of the Maryland Declaration of Rights, which declares that no man ought to be "deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land." Appellant, appearing specially in the attachment case for the purpose of quashing the writ of attachment, sought to defend its interest in the attached motor vehicle without subjecting itself to the jurisdiction of the Superior Court.

Attachment proceedings, except those used as execution on judgment, are designed to accomplish two purposes: (1) to compel the appearance of the defendant to answer the plaintiff's demand, and (2) to give the plaintiff a security for the payment of his claim. This security is obtained at the commencement of the action by the seizure of the defendant's property. When the property is validly acquired, it is retained to await the result of the action, unless the defendant appears to the suit in the meantime and displaces the lien acquired under the attachment by substituting the security of a bond. If the defendant in a nonresident attachment suit appears, the proper course is to try the short note case against him before trying the attachment case. After the defendant has appeared and a verdict has been rendered in favor of the plaintiff in the

short note case, the entry of a judgment *in personam* will [fol. 68] not be arrested on account of the existence of any ground for quashing the attachment. Philbin v. Thurn, 103 Md. 342, 63 A. 571.

Nevertheless, it is permissible for a defendant whose property has been attached to appear in the action solely for the purpose of protecting his property and without subjecting himself personally to the jurisdiction of the court, even though in order to protect his property he contests the validity of the plaintiff's claim. In such a case the court has jurisdiction over the property attached, but does not have jurisdiction over the person of the defendant. In support of this rule, the American Law Institute states: "If the court thereby acquires jurisdiction over him personally, in spite of his protestation that he does not intend to submit himself personally to the jurisdiction of the court, he has been placed in a difficult dilemma. He has been compelled either to lose his property, even though the claim against him is unfounded, or to submit himself personally to the jurisdiction of the court which otherwise could have no power over him." Restatement, Judgments, sec. 40.

But even acknowledging that appellant, a foreign corporation, was not subject to the State's jurisdiction, we hold that appellant may be held liable for the collection of the use tax from its Maryland customers. Appellant relied on two Mississippi decisions, Reichman-Crosby Co. v. Stone, 204 Miss. 122, 37 So. 2d 22, and Stone v. Reichman-Crosby Co., 43 So. 2d 184, holding that a nonresident seller engaged in interstate commerce is not subject to the State's jurisdiction and taxing power so as to be personally liable for failure to collect and pay a tax levied against citizens of Mississippi. We follow the decisions of the United States Supreme Court, rather than the Mississippi decisions.

In Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62, 59 S. Ct. 376, 83 L. Ed. 488, the Court held that the California Use Tax Act requiring retailers to collect the use tax from purchasers did not violate the Due Process Clause of the Fourteenth Amendment as applied to appellant, an Illinois corporation, which did not carry on any intra- [fol. 69] state operations in California and was not sub-

ject to its jurisdiction, as against the argument that California lacked the power to require it to act as the State's collecting agent for the use tax and to insure payment of the tax if it failed to make collections from the tax debtors. Again in Southern Pacific Co. v. Gallagher, 306 U. S. 167, 59 S. Ct. 389, 83 L. Ed. 586, the Court held that the California use tax, as applied to tangible personal property purchased outside the State by the railroad company and installed on importation or kept available for use as part of the transportation facilities, was not invalid as violating the Due Process Clause, since the taxable event was the exercise of property rights in California.

In General Trading Co. v. State Tax Commission of Iowa, 322 U. S. 335, 64 S. Ct. 1028, 1029, 1030, 88 L. Ed. 1309, where a Minnesota seller had no office, branch, warehouse, or general agent in Iowa, but shipped goods from Minnesota to purchasers in Iowa, Justice Jackson, dissenting, said: "So we are holding that a state has power to make a tax collector of one whom it has no power to tax. Certainly no state has a constitutional warrant for making a tax collector of one as the price of the privilege of doing interstate commerce. * * * The power of Iowa to enforce collection in other states is certainly very limited and the effort to do so on any wide scale is unlikely either to be systematically pursued or successfully executed."

While it may be true that the tax can be easily evaded, nevertheless the Court, speaking through Justice Frankfurter, said: "The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer—the Iowa resident who is paying taxes to sustain his own state government. To make the distributor the tax collector for the State is a familiar and sanctioned device."

As we find no valid objection to the assessment, we affirm the judgment entered in the short note case in favor of the State and also the order in the attachment case denying appellant's petition to quash the attachment.

Judgment affirmed, with costs.

Order affirmed, with costs.

[fol. 70] In Court of Appeals of Maryland, October Term, 1952

No. 93

Mandate—March 11, 1953

Miller Brothers Company

vs.

State of Maryland

2 appeals in one record from the Superior Court of Baltimore City.

Filed: Oct. 27, 1952.

March 11, 1953, Judgment affirmed, with costs.
Order affirmed, with costs.
Opinion filed.
Op. Delaplaine, J.

[fol. 71] In the Court of Appeals of Maryland

[Title omitted]

Petition for Appeal—June 4, 1953

To The Honorable, Simon E. Sobeloff, Chief Judge of the Court of Appeals of the State of Maryland:

The petition of Miller Brothers Company, appellant, in this Court and defendant in the Superior Court of Baltimore City, respectfully shows:

Considering itself aggrieved by the final order and judgment of this Court entered on March 11, 1953, for the reasons set forth in the accompanying Assignment of Errors, petitioner prays that an appeal be allowed to the Supreme Court of the United States from said final order and judgment and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said appellant and that the amount of security for costs

be fixed by the order allowing the appeal; and that a transcript of the material parts of the record, proceedings and papers upon which said final order and judgment were based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Respectfully submitted, James Piper, William L. Marbury, William Poole, James L. Latchum, Counsel for Appellant.

Dated: June 4, 1953.

[fol. 72] IN THE COURT OF APPEALS OF MARYLAND

[Title omitted]

ORDER ALLOWING APPEAL—June 4, 1953

Miller Brothers Company having made and filed its petition praying for an appeal to the United States Supreme Court from the final order and judgment of this Court in this cause entered on March 11, 1953, and from each and every part thereof, and having presented its assignment of errors and prayer for reversal and its statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is this 4th day of June, 1953, hereby

Ordered that said appeal be and the same is hereby allowed as prayed for; and

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $250.00 with good and sufficient surety and shall be conditioned as may be required by law;

It is further ordered that citation shall issue in accordance with law; and

[fol. 73] It is further ordered that the Clerk of the Court of Appeals of Maryland prepare, certify and transmit to the Supreme Court of the United States the transcript of record.

Simon E. Sobeloff, Chief Judge.

[fol. 74] IN THE COURT OF APPEALS OF MARYLAND

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—June 4, 1953

Miller Brothers Company, a body corporate, appellant in the above entitled cause, in connection with its appeal to the Supreme Court of the United States, hereby files the following assignment of errors upon which it will rely in its prosecution of said appeal from the final judgment of the Court of Appeals of Maryland entered on March 11, 1953.

(1) The Court of Appeals of Maryland erred in upholding the validity of the Maryland Use Tax Act (Chapter 681 of the Acts of 1947, as amended; codified as Sections 368-396, inclusive, of Article 81 of the Annotated Code of Maryland, 1951 Edition) which makes appellant liable for use tax on goods sold in Delaware to residents of Maryland and subsequently taken by such residents into Maryland for use there, since the exaction of such a tax is repugnant to the Commerce Clause of the Federal Constitution.

(2) The Court of Appeals of Maryland erred in upholding the validity of the Maryland Use Tax Act which makes appellant liable for a use tax on goods sold by appellant in Delaware to residents of Maryland and subsequently delivered to such residents by common carrier because the exaction of such a tax is repugnant to the Commerce Clause of the Federal Constitution.

(3) The Court of Appeals of Maryland erred in upholding the validity of the Maryland Use Tax Act which makes [fol. 75] appellant liable for a use tax on goods sold by appellant in Delaware to residents of Maryland and subsequently delivered to such residents in motor vehicles owned and operated by appellant, since the exaction of such a tax is repugnant to the Commerce Clause of the Federal Constitution.

(4) The Court of Appeals of Maryland erred in upholding the validity of the Maryland Use Tax Act which makes appellant liable for use tax on goods sold in Delaware to

residents of Maryland and subsequently taken by such residents into Maryland for use there, since the exaction of such a tax is repugnant to the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

(5) The Court of Appeals of Maryland erred in upholding the validity of the Maryland Use Tax Act which makes appellant liable for a use tax on goods sold by appellant in Delaware to residents of Maryland and subsequently delivered to such residents by common carrier because the exaction of such a tax is repugnant to the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

(6) The Court of Appeals of Maryland erred in upholding the validity of the Maryland Use Tax Act which makes appellant liable for a use tax on goods sold by appellant in Delaware to residents of Maryland and subsequently delivered to such residents in motor vehicles owned and operated by appellant, since the exaction of such a tax is repugnant to the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

Wherefore, the appellant, Miller Brothers Company, prays that the said final judgment of the Court of Appeals of Maryland be reversed and the said court be directed to [fol. 76] enter judgment in favor of the appellant; and prays for such other relief as the Court may deem fit and proper.

James Piper, William L. Marbury, William Poole, James L. Latchum, Counsel for Appellant.

Dated: June 4, 1953.

[fol. 77] Citation in usual form showing service on Francis D. Murnaghan, Jr., omitted in printing.

[fols.78-80] Statement Required by Paragraph 2 of Rule 12 of the Rules of the Supreme Court (omitted in printing).

[fols. 81-86] Cost Bond on Appeal for $250.00 approved June 8, 1953 omitted in printing.

[fol. 87] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 88] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 160

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON—Filed July 10, 1953

Appellant adopts for its statement of points upon which it intends to rely in its appeal to this Court the points contained in its Assignment of Errors and Prayer for Reversal heretofore filed.

James Piper, William L. Marbury, William Poole, James L. Latchum, Counsel for Appellant.

Dated: July 9, 1953.

[fol. 89] Proof of Service (omitted in printing).

[fols. 90-91] [File endorsement omitted]

[fol. 92] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. 160

[Title omitted]

STIPULATION AS TO PRINTING—Filed July 14, 1953

The parties to the above-entitled cause hereby stipulate that the following parts of the record should be printed by the Clerk of the Supreme Court:

No.		Record Pages
16.	Opinion of Court of Appeals dated March 11, 1953	120-129
17.	Petition for Appeal to Supreme Court	60
18.	Order Allowing Appeal to Supreme Court	61- 62
19.	Assignment of Errors and Prayer for Reversal	63- 65
20.	This Stipulation as to Printing	

James Piper, William L. Marbury, William Poole, James L. Latchum, Counsel for Appellant; [fol. 94] Edward D. E. Rollins, Attorney General, J. Edgar Harvey, Deputy Attorney General, Francis D. Murnaghan, Jr., Assistant Attorney General, Counsel for Appellee.

Dated: July 14, 1953.

[fols. 95-96] [File endorsement omitted]

[fol. 97] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 160

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—October 12, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the summary docket and assigned for oral argument immediately following No. 128, County Board of Arlington County, Virginia, et al. vs. State Milk Commission.

The Chief Justice took no part in the consideration or decision of this question.